No. 3942

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY ROGULJ,

Appellant,

vs.

ALASKA GASTINEAU MINING COMPANY, a Corporation,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT FOR ALASKA, DIVISION NUMBER ONE.

Brief for the Appellant

J. H. COBB,
Attorney for Appellant.

JUNEAU SUNDAY CAPITAL PRINT

In The

United States Circuit Court of Appeals

For The Ninth Circuit

MARY ROGULJ,

Appellant,

vs.

ALASKA GASTINEAU MINING COMPANY, a Corporation,

Appellee.

Upon Appeal from the District Court for Alaska, Division Number One.

Brief for the Appellant

STATEMENT OF THE CASE.

This was a suit brought bythe appellant, in the Court below, to recover of the defendant compensation for the death of her son while in defendant's employ, under the Alaska Workmen's Compensation Act, Session Laws of Alaska, 1915, Chapter 71.

The complaint alleged facts showing the de-

fendant to be subject to the provisions of the Compensation Act, which were admitted in the answer. It then alleged that on November 30th, 1915, Peter Rogulj, a son of plaintiff, upon whom she was dependent, was killed while in defendant's employ, and prayed for judgment for $1,200.00, the amount of compensation fixed in the Act. (Rec. pp. 1-3). The suit was filed November 30th, 1917.

The answer admitted all the material allegations of the complaint, except the dependency of the plaintiff upon the deceased, which was denied. (Rec. pp. 5-7). It then alleged an affirmative defence, which, omitting formal parts, was as follows:

II.

"That both the defendant and Peter Rogulj hereinafter mentioned, were, at the times hereinafter mentioned, subject to all the provisions of Chapter 71 of the sessions laws of the Territory of Alaska, 1915, commonly known as the Workmen's Compensation Act."

III.

"That on the 30th of November, 1915, one Peter Rogulj, who was then in the employ of the defendant, in connection with its mining operations, was killed while in such employment."

IV.

"That at the time the said Peter Rogulj entered the employ of the defendant, on or about the 1st day of September, 1015, he furnished this defendant with a statement containing the names of his beneficiaries in accordance with the provisions of section 9 of said Compensation Act, which said statement also contained the address of said beneficiaries."

V.

"That the name of the beneficiary designated in said statement by said Peter Rogulj, was Mary Rogudj, his step-mother; and that the address of the said Mary Rogulj as set forth by the said Peter Rogulj in said statement was at Pocada, Austria."

VI.

"That on the 1st day of December, 1915, the same being within ten days from the date of the accident which resulted in the death of the said Peter Rogulj, the defendant mailed to the said Mary Rogulj at the said address, by registered mail, a notice of the death of the said Peter Rogulj with a request that she file her claim for compensation if any; which said notice was prepared and mailed in accordance with the provisions of section 9 of the said Compensation Act."

VII.

"That no claim for compensation was filed with the defendant nor with anyone in its employ by the said Mary Rogulj nor anyone on her behalf within 120 days from the date of the death of the said Peter Rogulj, nor at any other time."

The plaintiff filed a reply denying for want of information the allegations of the sixth paragraph of the above answer, and affirmatively alleged:

"For further reply to the said affirmative answer, the plaintiff alleges: That at the time of the death of Peter Rogulj, her son alleged in the complaint herein, she was a resident of the then kingdom of Austria; that she had no knowledge of the said accident and owing to the state of war then prevailing throughout Europe and the interruption of all communications both by mail and cable, no

means of obtaining such information within 120 days from and after such accident; that plaintiff had another son in the employ of the defendant, to-wit: Matt Rogulj; that said Matt Rogulj immediately after the death of the said Peter Rogulj went to the defendant for the purpose of making claim in behalf of his mother, this plaintiff, for the compensation provided for by statute in such cases made and provided; that the defendant then and there admitted its liability to pay such compensation and promised and agreed with the said Matt Rogulj to pay the same so soon as he should obtain written authority to represent this plaintiff and to acknowledge a release and acquittance of said claim in behalf of plaintiff and the defendant expressly advised said Matt Rogulj, then acting in behalf of the plaintiff, that he need take no other steps and need not consult an attorney but all that was necessary to do to obtain the said compensation for plaintiff was to secure said power of attorney; that the said Matt Rogulj, as agent for defendant, relied upon said promise of representation and was thereby lulled into security and accepted the advice of the defendant and did not consult an attorney nor take any further steps except to send for said power of attorney as directed by the defendant; that before information of said matters and things could be transmitted to the plaintiff and a power of attorney executed and returned to the said Matt Rogulj, more than 120 days had expired; that the plaintiff did execute the power of attorney aforesaid and transmitted the same as speedily as war conditions would permit to her said agent, Matt Rogulj, but when the same was received by the said Mat tRogulj

and a request made for the payment of said moneys, the defendant declined and refused to pay the same for the reason that a written demand or claim therefor had not been presented within 120 days.

Plaintiff further alleges: That by its representations, promises, and advice aforesaid to the said Matt Rogulj, then acting in behalf of the plaintiff which actions were ratified by the plaintiff, the defendant expressly waived notice in writing of the claim of plaintiff for compensation; and further alleges that said promises, representations and advice was given for the express purpose of inducing the said Matt Rogulj to not present the claim in writing for said compensation, the defendant at the time purposing and intending if it should succeed in said fraudulant purposes, to plead the failure to give notice as a defence and thereby defraud the plaintiff of her claim under the statute whereby the defendant is estopped from claiming or pleading the affirmative offence aforesaid." (Rec. pp. 8-11).

To this affirmative reply the defendant demurred (Rec. p. 13) and the demurrer was sustained. (Rec. p. 14).

The plaintiff thereupon filed an amended reply in which she admitted (by failing to deny) paragraphs one, two, three and four of the affirmative answer, and denied paragraphs five, six and seven. (Rec. p. 15). That is to say, she admitted that defendant was incorporated; that both plaintiff and Peter Rogulj were under the Compensation Act; that Peter Rogulj was killed while in the employ of defendant on November 30th, 1915, and "that at the time the said Peter Rogulj entered into the employ of the defendant, on or about the 1st day of

September, 1915, he provided this defendant with a statement containing the names of his beneficiaries in accordance with the provisions of section 9 of said Compensation Act, which statement also contained the address of said beneficiaries."

Plaintiff denied that the address of Mary Rogulj, as set forth in said statement, was Podoca, Austria, and the further allegations of paragraphs six and seven of the answer above set out, were also put in issue.

It will thus be seen that the issues to be tried were quite narrow, viz:

First, was the plaintiff dependent upon her son Peter at the time of his death?

Second, did the defendant within ten days after the death of Peter, mail to the plaintiff *at the address given in the statement furnished by Peter Rogulj* the notice required by the Act, so as to bar plaintiff's right of recovery?

There was no conflict in the evidence, which was very brief. The dependency was proved without dispute, (Rec. pp. 19-20) and plaintiff rested.

The defendant, to establish its affirmative defense, read the following stipulation as to certain facts, to-wit:

"That on September 7, 1915, Peter Rogulj entered the employ of the Alaska Gastineau Mining Company, and that upon said date he signed a certificate of employment and a statement under the provisions of Section Nine of the Workmen's Compensation Act of Alaska. That said statement was made by Peter Rogulj and that he stated that he had a brother named Matt Rogulj, who was at that time working for the Alaska Juneau Mine, and he fur-

ther stated that he, the said Peter Rogulj, was not married and had no children, and that his father was dead and that he had a step-mother at that time living at Podaca, Austria, named Mary Rogulj, and that her age on September 7, 1915, was sixty-three. It is further stipulated that said statement was signed in accordance with the provisions of Section Nine, Chapter 71 of the Session Laws of Alaska, 1915, known as the Workmen's Compensation Act for Alaska, and that the said statement was signed in the presence of and witnessed by L. J. Reedy." (Rec. pp. 20-1).

It next introduced the testimony of B. L. Thane, who was General Manager of the defendant Company from November 1st, 1915, to May 1st, 1916, and who testified that during said period neither Mary Rogulj nor any one in her behalf filed on served upon him any claim in writing for compensation for the death of Peter Mogulj. (Rec. p. 21).

It was proved by the testimony of G. T. Jackson, assistant Manager of the defendant, and by Miss Manning, clerk in the post office at Juneau. that on December 1st, 1915, a notice sufficient under the Compensation Act. was mailed by registered mail to Mary Rogulj, addressed to Podaca, Austria. (Rec. pp. 21-23). G. T. Jackson further testified that neither Mary Rogulj nor any one in her behalf filed with or served upon him any claim for compensation within 120 days after November 30th, 1915. Defendant then rested.

The plaintiff introduced the witness, Mike Juras, who testified in substance, that he was a native of Austria and knew Mary Rogulj before he

came to this country, and knew where she lived and her post office address; was born in the same neighborhood; that Mary Rogulj's post office address was "Zastroy, selo Bodaca, Dalmatia, Austria." Defendant's counsel objected to the above testimony as incompetent, irrelevant, and immaterial; plajntiff's counsel offered to prove further by the witness that Mary Rogulj lived, and had always lived at Podaca, Austria; that Podaca was not a postoffice, but a mere country district; that her postoffice address was and always had been "Zastroy, selo Bodaca, Dalmatia, Austria," but the Court sustained the objection of defendant, refused said offer and thereupon instructed the jury to return a verdict for the defendant, to all of which the plaintiff excepted. (Rec. pp. 24-25).

Judgment having been entered upon the instructed verdict the case is brought here upon the following

Assignments of Error.

I.

"The Court erred in sustaining the demurrer of the defendant to the affirmative reply of the plaintiff setting up the waiver and setoppel as against the defendant to plead the special limitation of one hundred and twenty days within which to serve notice of the claim sued upon."

II.

"The Court erred in sustaining the objections of the defendant to the testimony of Mike Juras tending to show that Mary Rogulj, the plaintiff, lived and had always lived at Podaca, Austria, that Podaca was not a postoffice, but a mere country district; that her postoffice address was and always

had been, Zastroy, selo Bodaca, Dalmatia, Austria."

III.

"The Court erred in instructing the jury to return a verdict for the defendant."

ARGUMENT.

The Act under which this suit was brought, so far as material to the questions involved on this appeal, is as follows:

"Section 9. Every employee coming within the provisions of this Act, shall, either at the time he ,or she, is employed, or thereafter, furnish his, or her, employer with a written statement showing the name or names of each and all persons that would be entitled to benefits under the provisions of this Act in case such employee should become deceased as a result of an injury received by him, or her, arising out of and in the course of his or her employment; such written statement shall bear the date upon which the same shall be furnished to the employer, and shall be signed by the e mployee. Provided, that, in cases where such employee is unable to write his, or her, name, his, or her, name may be affixed to such statement by another, and such employee shall make his, or her, mark in the manner customary in such cases, and such mark shall be made in the presence of at least one witness, who shall subscribe such statement as a witness.

"In all cases where there shall be a change of beneficiaries, or a change in the address of any beneficiary, the employee may furnish the employer with a new statement showing such change; such new statement to be so furnished shall in all respects conform and comply with the provisions hereof with

reference to the original statement to be furnished.

"In all cases where such statement, or statements, is or are, furnished the employer by the employer, the employer shall of such employee become deceased, as a result of an injury received in the course of his or her employment, notify each beneficiary named in the last statement of that fact; such notice shall be given by sending each beneficiary at the address given in the last statement furnished a copy of such notice by registered mail, and an envelope containing such notice addressed to each beneficiary at the address given in said last statement furnished, shall be deposited in the Post Office and registered, within ten days after such employee shall have become deceased.

"The notice to be so given shall be substantially in the following form: (Then follows form of notice).

"Any failure on the part of the employee to supply the employer with a statement as hereinabove provided shall not work a forfeiture of the right of his, or her, beneficiaries to benefits hereunder, but it shall relieve the employer of all obligation to give to any of the beneficiaries of such deceased employees notice of the fact the such deceased employee became deceased. In cases where the employer shall have been furnished with such statements and shall fail to notify the beneficiaries therein named as shown by the last statement furnished, within the time and in the manner herein provided, such beneficiaries who have not been no notified have the right to notify the employer of their claim to benefits and file claims and prosecute actions or other proceedings for the recovery there-

of, notwithstanding the fact that such notice was not served as hereinafter provided within the period of one hundred and twenty (120) days from and after the time that the employee became deceased.

"Upon the trial of any issue relating to a beneficiary's right to compensate under this Act, any statement furnished an employer, as hereinafove provided, may be offered in evidence by such employer and when so offered shall be received in evidence and shall be held to establish the fact that the persons named in the statement bore to the deceased the relation shown by such statement at the date thereof.

"In all cases where any person claims to be a beneficiary under this Act entitled to compensation because of an injury to an employee coming within its provisions, which resulted in his or her death, death, such beneficiary, or someone in his or her behalf shall within one hundred and twenty (120) days from and after th edeath of such employee serve a written notice upon the employer, which notice shall contain the name and address of the person claiming to be such beneficiary, the relationship existing between such beneficiary and the deceased, and if such beneficiary shall be either the father or mother of the deceased, such notice shall also contain a statement showing that such person was dependent upon the earnings of the deceased. Such notice shall be liberally construed and no claim for compensation shall be denied because of any defect in the notice, provided it appears that a notice was served with a bona fide intention to comply with the provisions of this Act. Such notice may be served by any person of legal age by deliv-

ering a copy thereof to the employer or the employer's agent, in person, or, by leaving a copy thereof at the employer's principal place of business within the Territory of Alaska with some person over the age of eighteen (18) years in the employ of such employer. If the employer cannot be found within the Territory and has no known agent or place of business therein, such beneficiary may serve such notice by publishing the same in one issue of any newspaper of general circulation published in the Judicial Division where the injury, out of which the compensation arose, occurred; except in the cases in this section otherwise expressly provided, no action or other proceeding to recover such compensation shall be brought or maintained, nor shall any claim for such compensation be filed or allowed as hereinafter provided unless such notice shall have been served in the manner and within the time herein provided."

First: The demurrer to the affirmative matter to the original Reply:

It is manifest that the requirement of the notice from the beneficiary to the employer of the claim is solely for and in the interest of the employer. No reason therefore, could be suggested why such notice may not be waived. Indeed in all the similar Acts passed in the states, in so far as we have examined them, before a failure to give a notice can operate as a defence, the employer must plead and prove he was injured thereby. That provision was omitted from the Alaska Act, it is true, and the point is not here involved. But it is clear from the record that the defendant knew all the facts of which it could have been informed by the making of

the claim; that is, it knew that Mary Rogulj was the mother and beneficiary of Peter, and was dependent upon him, and therefore, she was entitled to $1,200.00. If the defendant then expressly waived this idle ceremony, can it be said that the failure of the plaintiff's other son to thereupon comply with it is to bar her relief? The law, we think, is well settled to the contrary.

"As a general rule, subject to the exceptions hereafter noted, a party may waice any legal right to which he is entitled. Rights growing out of contracts may, of course be waived, likewise rights conferred by statute, and constitutional rights may be waived by the party in whose benefit the rights accrue."

29 American & English Enc. Law, 2nd Edition p. 1107.

The exceptions to the general rule above stated, are, first, on grounds of public policy, as where there is a waiver of usury, or where the contract is illegal or immoral, and second, lack of jurisdiction. (Ib. 1107-8.) Manifestly the exceptions have no application here.

The rule has been applied to this defence under Workmen's Compensation Laws.

Roberts vs. Chas. Wolf Packing Co., 149 Pac. 413.

Conway Co. vs. Ind. Board, 118 N. E. 705.

Smith vs. Home Safety Boiler Co., 112 Atl. 516.

But the facts set up in the reply were not only a waiver but a complete estopel in pais, against the defense set up in the answer. The defendant, by its conduct and representation, induced plaintiff's

agent, in reliance thereon, to fail to give the notice, but to take only the steps defendant had represented as solely necessary; namely, secure a written power of attorney, and then when the 120 days had expired without the notice being given, it plead the failure as a defence.

"Equitable estoppel in the modern sense, arises from the *conduct* of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts and his silence or negative omission to do anpthing. Its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel." 2 Pom. Eq. 3rd Ed. p. 1416.

Second: The *second* and *third* assignments relate to the same error, and will be presented together.

The Compensation Act in question, in section one thereof, where the employer and the employee have not in the manner therein provided, elected not to operate under the statute, provides:

"The compensation to which such employee so injured, or, in case of his or her death, if death result from such injury, such beneficiaries, shall be entitled, and for which such employer shall be legally liable shall be as follows:" Then follows a schedule of amounts, including $1,200.00 to the mother for the death of a son upon whom she was dependent.

Session Laws of Alaska, 1915, p. 146, and sub-section D, p. 147.

By this provision of the law, the right to compensation became vested in the plaintiff immediately upon the happening of the death of Peter Rogulj. The failure to file the claim then is a *defense*, the burden of proving which is upon the defendant. Bearing this in mind, let us examine the record in the light of the provisions of Section 9. (quoted above) as to facts admitted; the evidence on the facts disputed, and the evidence excluded under this issue.

It was admitted that defendant and Peter Rogulj were at the time of his death, operating as employer and employee, under the Compensation Act: It was admitted that at the time of his employment, Peter Rogulj furnished the defendant with a statement giving the name of Mary Rogulj as his beneficiary, and giving her *postoffice address*. The remaining facts necessary to make out the defense were in dispute. These facts were: First, that within ten days after Peter's death the defendant mailed by registered mail a notice to Mary Rogulj addressed to her at the post office address furnished by Peter. Second, that neither Mary Rogulj nor anyone in her behalf did, within 120 days from said death file, or serve a claim, as provided in Section 9.

Defendant failed to produce and offer in evidence the written statement of Peter Rogulj. It proved that it sent by registered mail a notice addressed to Mary Rogulj, Podaca, Austria. *Unless this was the address furnished by Peter, the faliure of the plaintiff to file the claim within* 120 *days was*

no defence. With the proofs in this condition, the plaintiff offered to prove what the post office address of Mary Rogulj was and had always been, and that the actual address of the notice mailed was not her post office address, nor any postoffice address. This offer was denied by the Court. Had it not been denied the jury might well have concluded, indeed it would have been their duty to conclude under proper instructions, that the statement furnished by Peter Rogulj showed that plaintiff lived in Podaca (or Bodaca) Austria, and that her post office address was Zestroy, selo Bodaca, Dalmatia, Austria, and that defendant had failed to properly mail the notice to the plaintiff, which was the foundation of the sole defence it had. Had the evidence offered and excluded been admitted, we think it would have been the duty of the Court to have instructed a verdict for the plaintiff, for the evidence on the defence then would have stood, with an admission that Peter Rogulj furnished a state ment containing the post office address of plaintiff; that the address was Zastroy, selo Bodaca, Dalmatia, Austria, and that defendant had mailed the notice to another and different address, and had therefore failed to put itself in a position to make the defence of a failure of the plaintiff to file her claim within 120 days from the date of the death of Peter Rogulj.

The instruction of the Court, however, to find for defendant, was error as the evidence stood. There was no evidence tending to show what post office address was furnished by Peter Rogulj.—simply that he furnished his mother's post office address, and stated that she lived in or at Bodaca.

Austria. A jury might possibly have inferred from this that Podaca, Austria, was her address. But it was not the province of the Court to conclusively infer this for them. For the jury, under proper instructions, might equally well have concluded that the defendant had failed to prove its defence. The argument may be made clearer perhaps, by an illustration.

Suppose the evidence had been that Peter Rogulj had stated that his mother lived in California, United States of America; that he had given defendant her post office address as Mary Rogulj, San Francisco, California, U. S. A., and that the defendant had mailed the notice to her addressed to Mary Rogulj, California, U. S. A. Under such proof could any court or jury say that defendant had made out its defence under the law? Clearly not.

The directed verdict was erroneous for another reason,—failure of the proof to show that no claim had been filed by plaintiff or by some one in her behalf. The only proof offered on this issue was the testimony of Thane, the General Manager of defendant and of Jackson, assistant Manager, that no such claim had been filed with them. There was no testimony however, that the notice of claim had not been filed with or served upon some other agent of defendant, nor that it had not been left at defendant's principal place of business with some person in its employ over the age of eighteen years.

The burden of making out its defence was on the defendant, and it failed.

We most respectfully but earnestly ask that the judgment below be reversed and the cause remained

for such further proceedings as the Court may think proper.

J. H. COBB,
Attorney for Appellant.